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The Honorable Lee Rosenthal
United States Courthouse
515 Rusk Street, Room 11535
Houston, TX 77002

Dear Judge Rosenthal:

I have prepared this submission to provide you with my thoughts on the issues of preservation and safe harbor, which Professor Marcus's September 15, 2003 memorandum addresses in its discussion of a possible Rule 34.1.[1] It is my view that it is essential that the Federal Rules of Civil Procedure be amended to include a strong safe harbor for parties' ability to destroy electronically stored documents in the ordinary course of business. However, I think it is highly inadvisable for the Rules to include a distinct preservation obligation.

At first blush, these positions may appear inconsistent. One might assume, not unreasonably, that if the Rules are to be amended to include a safe harbor to protect parties to federal litigation in the destruction of possibly relevant documents those Rules should similarly be amended to include a corresponding obligation to preserve such documents. Closer examination of the nature and function of the Rule making process, however, demonstrates that no such parallelism exists between the two situations.

It might also be argued that any suggested distinction between a preservation obligation and a safe harbor is illusory, since creation of one automatically establishes the other. By imposing a preservation obligation, the argument would proceed, a Rule would simultaneously establish a safe harbor for any activity not restricted by the obligation, and similarly creation of a safe harbor would automatically impose a preservation obligation for any activity not insulated by the guaranteed protection. In a certain sense, of course, this is correct. But such a simplistic equation ignores the fundamental

[1] In my earlier submission, I provided you with my initial thoughts on the possible formulation of Rule 34.1 articulated by Professor Marcus. However, I have now been commissioned by the firm of Mayer, Brown, Rowe & Maw LLP, with whom I am special counsel, to prepare this more detailed submission concerning the issues of preservation and safe harbor. The views expressed here, I should note, are solely my own.

difference of inertia. When an *ex ante,* categorical preservation obligation is imposed, the inertia favors preservation, unless altered in a specific case by the court. When no categorical preservation directive has been adopted, there can be no liability for destruction absent violation of a court order prohibiting such destruction.[2] In contrast, when a safe harbor is established, the inertia favors continuation of routine document destruction plans, unless ordered otherwise by a court in a specific case. Moreover, were a safe harbor to be inserted into the Federal Rules, it would place direct limitations on alternative means of imposing categorical restrictions on document destruction. Thus, in important ways the two modes of operation are quite distinct.

In the remainder of this submission, I will undertake a number of tasks. First, I will consider the role that the Rules are designed to play in the control of litigation and contrast that role with the need for a form of individualized "managerial judging," in which the judge in the individual case establishes the standards for the conduct of the litigation. Second, I will explain why, in light of those different roles, it is necessary to include in the Federal Rules an express safe harbor for parties' electronically stored document destruction but would be counter-productive to include a categorical document preservation obligation. In undertaking this analysis, I will explore the matrix of different social goals and values that, I believe, normatively underlie our litigation system. This exploration, I will argue, establishes that litigants must be provided with a floor of certainty in their understanding of what electronically stored documents they may reasonably expect to be able to destroy in the ordinary course of business and that therefore a Rules-based directive is necessary in order to assure such predictability. Moreover, I will argue that the matrix of values underlying our litigation system dictates that such a directive enable parties to continue electronically stored document destruction in accordance with a reasonable, generalized plan of document destruction, established before the parties were aware of the litigation in question, until a court directs otherwise.

I. THE ROLE OF RULE-BASED DIRECTIVES IN THE CONTROL OF LITIGATION

At the extremes, litigation may be controlled either through the creation of a system of *ex ante* categorical rules that dictate generalized directives, to be applied by the judge in the individual case, or through the case-by-case judicial development of rules intended to regulate the specific aspects of a particular case. Of course, a middle course is also conceivable, one in which the *ex ante* directive provides the judge in the individual case with guidance but simultaneously allows the judge to exercise broad discretion in light of the specific needs of that case. On occasion, a rule may be nothing more than a broadly phrased directive that delegates virtually unlimited discretionary authority to the judge in the individual case. In deciding whether to deal with a particular procedural problem either at one of the extremes or somewhere in between, it is necessary to understand both the advantages and disadvantages of the *ex ante* categorical directive on

[2] Such directives, it should be noted, need not come in the form of a Federal Rule. Rather, they could also be imposed either by statute or common law rule.

the one hand and individualized judicial authority on the other. Such an analysis, I believe, clearly demonstrates that the safe harbor function must be performed through adoption of an *ex ante* categorical rule, while the preservation obligation is much more appropriately performed through the discretionary exercise of judicial authority in the individual case.

A. Determining the Highest and Best Use of Categorical Rules and Individualized Judicial Discretion

There are, basically, three values conceivably served by a "strong" *ex ante* categorical rule (i.e., a categorical rule that leaves a judge with little or no case-by-case discretion). First, such rules are necessary when they concern matters that affect litigants' primary conduct (i.e., their conduct outside the four walls of the court house). Both Professor Henry Hart and Justice John Harlan emphasized the need for such predictability, specifically in the context of the choice between federal and state law under the *Erie* doctrine. In Professor Hart's words, "[p]eople repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown." [3] Justice Harlan urged avoidance of "a debilitating uncertainty in the planning of everyday affairs."[4] Thus, when the area to be regulated affects how litigants plan their everyday affairs, it is advisable to have the governing standard determined by as categorical a directive as is reasonably possible.

The second function that categorical directives may serve is to provide governing standards when it would be infeasible for the court in the individual case to do so. Thus, where the court will not become involved in the case until a point in the process at which harm sought to be avoided will likely have occurred, then leaving the matter to individualized judicial control would provide an inadequate means of protecting the interests involved. The criminal laws illustrate such a situation: At the point at which the court becomes involved in the process, the harmful conduct has already occurred. Thus, the only means of preventing such behavior is to proscribe it in an *ex ante* categorical manner, and subsequently punish non-compliance. Finally, a categorical directive may be called for when those in policy making authority seek to preempt individualized decision making that could undermine certain overriding value judgments sought to be implemented by policy makers.

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3 Henry Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 489 (1954). See also Henry Hart & Herbert Wechsler, *The Federal Courts and the Federal System* 634 (1953) (advocating certainty for "those rules of law which characteristically and reasonably affect people's conduct at the stage of primary activity.").

4 *Hanna v. Plummer,* 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

B. Applying the Categorical-Individualized Comparative Analysis: Why The Federal Rules Should Provide for a Safe Harbor But Not for a Preservation Obligation

1. Why the Federal Rules Should Include a Safe Harbor

The most important justifications for creation of a safe harbor are the very same reasons why such a safe harbor belongs in the Federal Rules of Civil Procedure. Commercial entities need predictability in the planning of their primary conduct. Absent such predictability, many of the key goals sought to be fostered by the litigation system may be seriously undermined.

In my scholarship, I have gleaned six elements that together make up the matrix of normative values underlying the litigation system: (1) decision making accuracy, (2) adjudicatory efficiency, (3) political legitimacy, (4) maintenance of the substantive-procedural balance, (5) predictability, and (6) fundamental fairness.[5] At least three of these underlying values are threatened by the absence of a safe harbor for document destruction within the Federal Rules of Civil Procedure. Initially, absent such a categorical directive it will be impossible for commercial enterprises to know exactly what obligations will be imposed upon them with regard to their document destruction policies. This lack of predictability is, in and of itself, problematic, as the writings of both Professor Hart and Justice Harlan have so effectively demonstrated. Moreover, the uncertainty threatens two other underlying values, maintenance of the substantive-procedural balance and fundamental fairness.

The concern over the maintenance of the substantive-procedural balance derives from recognition of the fact that procedural rules will often have a substantial impact well beyond the four walls of the court house. The Supreme Court has long recognized the need to take into account such concerns in the development of its jurisprudence under the Rules of Decision Act,[6] particularly in its decisions in *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525 (1958), and *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415 (1996).[7] While of course the terms of the Rules Enabling Act prohibit a Federal Rule from "abridg[ing], enlarge[ing] or modify[ing] any substantive right," there can be little doubt that in shaping the Federal Rules it is both appropriate and advisable to take into account any important "incidental" impacts the Rules might have on behavior beyond the walls of the court house. *See Burlington Northern Railroad Co. v. Woods,* 480 U.S. 1 (1987).

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[5] Martin H. Redish, *Electronic Discovery and the Litigation Matrix,* 51 Duke L.J. 561, 593-94 (2001).

[6] 28 U.S.C. § 1652.

[7] *See also Harlow v. Fitzgerald,* 457 U.S. 800, 817-18 (1982) (refining the subjective good faith requirement for the immunity defense in civil rights suits for the purpose of facilitating the entry of summary judgments, thereby fostering the substantive goal of preserving officer immunity).

The problem caused by the absence of an *ex ante* safe harbor directive to the substantive-procedural balance results from a combination of the uncertainty of a litigant's preservation obligations and the enormous costs that flow from a disruption in an enterprise's electronically stored document destruction program. As I argued in my article on the subject two years ago and as the members of the Advisory Committee are no doubt aware, "to prohibit...routine destruction [of electronically stored documents] could impose substantial costs and disruptive burdens on commercial enterprises."[8] Experts in the field of electronic discovery have long accepted this view.[9] In the words of one commentator, "cost is an important reason to dispose of electronic data. It is true that mere storage of electronic data is inexpensive. But companies that seek to manage their electronic data as an information asset understand that storage represents only a small part of the cost of retaining an information asset. If the information is retained, it must be capable of being found, retrieved, and used. With large quantities of electronic data, these costs can be quite high."[10] The primary problem is that many repositories of electronic data "contain largely duplicative data, with relevant and non-relevant information intermixed. As huge duplicative sets of data accumulate, identifying and reviewing the small fraction that is relevant becomes increasingly difficult."[11]

Thus, although "[t]otal preservation is costly and typically unnecessary,"[12] a litigant uncertain of its preservation obligations will likely err on the side of over-retention. The added costs of such over-retention will inevitably be passed on to consumers of the enterprise's products or services, thereby skewing the choices of the marketplace. The drafters of the Federal Rules should be concerned that their failure to provide clear guidance in those Rules will likely result in wasteful and costly over-retention of electronically stored documents.

In addition to the potentially severe economic inefficiency that would inevitably flow from the lack of an *ex ante* categorical directive protecting litigant document destruction programs, the concern for fundamental fairness is also implicated by such an

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[8] Redish, *supra*, 51 Duke L.J. at 621.

[9] *See, e.g.*, Kenneth J. Withers, *The Real Cost of Virtual Discovery,* Federal Discovery News at 3 (Feb. 2001) ("the discovery of computer-based information appears to cost more, take more time and create more headaches than conventional, paper based discovery."); Joan E. Feldman, Deborah H. Juhnke, James L Michalowicz & Jonathan M. Redgrave, *Show Me the Money: Cost Concerns in Computer Discovery,* Glasser Legal Works, Electronic Discovery and Records Management Seminar 259, 260 (2002) ("Obviously, it is impractical and unwise to treat electronic data like paper discovery.").

[10] Peter Sloan, *Retention, Preservation, and Spoliation of Electronic Data,* Glasser Legal Works, Electronic Discovery and Records Management Conference 24, 25 (2002).

[11] Kenneth R. Shear, *Orders Freezing Backups—An Approach That Should Leave Courts Cold,* 3 Digital Discovery & e-Evidence 1 (July 2003). See also *id.* at 3 ("evidence retention requirements for litigation often last many years. Maintaining tape management databases for long periods of time can create severe logistical problems and unusual demands on corporate computer systems.").

[12] Daryll R. Prescott, Kenneth R. Shear & Tiffany A. Murphy, *Electronic Data Balancing Act: Preserve or Delete?,* Nat'l L.J. B7 (col. 2), 8/17/98.

absence. As I wrote in my article on electronic discovery, "the fundamental fairness concern permeates all other elements of the [litigation] matrix. It is grounded in the social contract implicit in American constitutional democracy, whereby government agrees to treats its citizens with dignity and respect. Recognition of these dignitary values extends beyond a narrow utilitarian concern for efficiency and accuracy. Rather, it demands that the processes employed provide litigants with a sense of participation and self-worth."[13]

Litigants may react to uncertainty in the nature of their preservation obligations in a number of ways. One of them, over-retention, has already been discussed. However, it is also conceivable that litigants may under-retain, on the basis of their reasonable belief that their retention plan is adequate, only to discover—after the fact—that this is not the case. In such cases, it is likely that the punishments that flow from their failure accurately to guess the extent of their retention obligations will contravene the basic notions of fundamental fairness, which require that citizens may be punished only for the violation of legal requirements that are known.[14]

2. Why the Federal Rules Should Not Include a Preservation Obligation

One might assume that the concerns for predictability, economic efficiency and fundamental fairness could be satisfied just as effectively by inclusion of a Federal Rule imposing a categorical preservation obligation as by inclusion of a Rule establishing a safe harbor for document destruction. Closer examination reveals, however, that this is far from the case. Initially, it would be impossible to fashion an *ex ante* preservation obligation that could provide sufficient guidance to litigants in individual cases to avoid the dangers of unpredictability—other than an absurdly over-protective and inefficient rule that *all* documents must be preserved for *every* law suit. The difficulty is that any such obligation would have to be phrased in general terms, requiring the litigants to apply that general rule to the facts of its individual case. This effort would require the litigants to predict how a court, *ex post,* would choose to fashion such an application—the very danger of unpredictability that gives rise to the threats to economic efficiency and fundamental fairness. No reasonable, categorically phrased preservation obligation could possibly avoid the harms of such unpredictability.

Moreover, inclusion of a categorical preservation directive in the Federal Rules is unnecessary to preserve the trial court's authority in the individual case. A court concerned about document retention may, if it chooses, issue an *ex parte* order requiring the preservation of specified categories of documents for a brief period of time, during which it may sort out more effectively which specific documents ultimately must be

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[13] Redish, *supra*, 51 Duke L.J. at 599-600.

[14] Lon L. Fuller, *The Morality of Law* 39 (revised ed. 1969) (asserting that basic morality of law prohibits "failure to make rules understandable" and establishing rules in a manner "that the subject cannot orient his action by them....").

retained by the parties.[15] Indeed, inclusion of a categorical rule of preservation would potentially undermine the values fostered by an individualized "managerial judging" model, pursuant to which judges "should not be restricted to traditional methods but should be given substantial flexibility to design dispute resolution procedures."[16] While of course the values of individualized judicial discretion will not overcome all competing procedural policy choices,[17] the drafters of the Federal Rules long ago recognized the value of managerial judicial discretion in the control of the discovery process when they promulgated the amendment to Federal Rule 26(b)(2) authorizing the court, in the exercise of its discretion, to limit the frequency or extent of discovery devices if it determines, among other things, that "the burden or expense of the proposed discovery outweighs its likely benefit...." This provision recognizes the values served by enabling the court to conduct the weighing process in the individual case. Inclusion of a categorical directive concerning preservation obligation might threaten the court's individualized control of the discovery process, thereby threatening the values fostered by the managerial judging model.[18]

In sum, a federal rule imposing a preservation obligation is either unnecessary or counter-productive, for three reasons: (1) it necessarily fails to provide litigants with the predictability sought to be fostered by inclusion of a categorical rule; (2) it is largely unnecessary to insure the trial court's ability to preserve its authority over document retention; and (3) it may threaten the court's ability to balance competing needs implicit in the document retention process in the individual case.[19]

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[15] It is true that the court's ability to preserve its authority could be threatened by a litigant's pre-filing program of *selective* document destruction, intentionally designed to destroy documents specifically related to the case. Thus, inclusion of a Federal Rule prohibiting solely such selective pre-filing destruction is conceivable. However, since every litigant can be presumed to be aware of such prohibitions, grounded either in well-established common law practice or specific statutory directives, inclusion of such a rule is likely unnecessary.

[16] Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation,* 53 U .Chi. L. Rev. 440, 445 (1986).

[17] *Cf.* Meade W. Mitchell, *Discovery Abuse and a Proposed Reform: Mandatory Disclosures,* 62 Miss. L. J. 743, 753 (1993) (stating that "one can hardly expect judicial involvement to cure all discovery ills.").

[18] Presumably the court, once the case has begun, would be able to override the categorical preservation directive, but even if this were so such override ability would not enable the court to avoid the costs that derive from pre-litigation over retention.

[19] It is true, of course, that inclusion of a categorical safe harbor similarly threatens the value of individualized judicial discretion. However, as previously noted there are occasions where it is appropriate to override this value to ensure attainment of predictability of a predetermined value judgment that applies categorically.

II. SHAPING THE CONTENT OF THE SAFE HARBOR

Once it is concluded that inclusion of a safe harbor is both advisable and appropriate, it is necessary to fashion the content of that provision. Largely for the reasons already discussed, the rule should provide that a litigant may maintain a reasonable program for the destruction of electronically stored documents[20] unless and until a court orders them to stop doing so. Note that this proposed standard contains two inherent limitations: First, the litigant's document destruction program must be deemed "reasonable," which means that it is consistent with industry practice and the reach of currently available technology. A litigant should not be permitted to insulate itself from discovery simply by adoption of an unnecessarily aggressive document destruction policy. Second, the safe harbor protection would extend only to the non-content based destruction of documents in the ordinary course of a generalized document destruction program. Intentional destruction of specific documents out of the normal order of document destruction when those documents may be relevant to either an ongoing litigation or to one the imminent existence of which the litigant is or should be aware is entirely unacceptable, for obvious reasons.

Even with these limitations, my proposed safe harbor may be criticized on the grounds that it would inevitably permit the destruction of relevant documents that are potentially of enormous probative value in the truth-finding process. If truth finding were the sole focus of the litigation process, this fact would render my proposed safe harbor wholly unacceptable. But as my earlier discussion of the "litigation matrix" made clear, truth finding is only one element within the intersecting matrix of values sought to be fostered by the litigation process. Indeed, that truth finding is not the sole focus of the litigation process is established by the very existence of evidentiary privileges. There can be no doubt that such privileges may significantly undermine attainment of the truth-finding goal, since they often exclude highly probative evidence from the fact finder's consideration. Moreover, the utilitarian calculus employed to determine the dictates of procedural due process includes truth finding as merely one of a number of potentially competing values.[21] As previously noted, failure to provide a protective floor for litigant document destruction threatens the alternative values of fundamental fairness, the need for predictability, and the need to maintain the substantive-procedural balance.

As troubling as the abstract possibility of the destruction of potentially relevant documents is, even more unsatisfactory are the alternatives. In many cases, it will simply be impossible for a potential defendant to predict exactly which documents a court will, at some later date, deem relevant. Moreover, in the context of electronically stored

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[20] Arguably, the safe harbor could extend to traditional paper documents, as well as electronically stored documents. However, because of the unique needs and burdens of electronic storage of documents, it is reasonable to confine the special protections of the safe harbor to documents that are electronically stored.

[21] *See Connecticut v. Doehr*, 501 U.S. 1 (1991); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

documents, the burdens of segregating potentially relevant documents from electronic storage would usually be enormous. Yet the alternative of total retention is equally troublesome because of the severe disruption it would cause to commercial record-keeping practices. Because many of the dangers of the routine destruction of relevant documents can be avoided by early court action, it appears clear that the interest in truth finding cannot be allowed to overwhelm the other vitally important concerns that underlie our litigation system.

III. CONCLUSION

The Advisory Committee is to be commended for recognizing the unique needs of electronic document storage with respect to discovery and spoliation. However, in its treatment of spoliation in the draft of Rule 34.1 included in Professor Marcus's memorandum, I believe that the Committee has unwisely chosen to create a distinct preservation obligation that is both unnecessary and potentially counter-productive. In addition, while I believe that the Committee is correct in its decision to include a type of safe harbor designed to protect the interests of those who must fashion routine document destruction policies that are both reasonable and efficient, I respectfully submit that the safe harbor needs to be broadened and reshaped in an effort to take account of the values of fairness, predictability and efficiency.

I hope the Committee finds these views helpful.

Sincerely yours,

Martin H. Redish